SIM TIAM HUAT & ANOR.

v.

KWAN KIM SWEE

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CIVIL SUIT NO. 275 OF 1978]
17 JANUARY 1984

TORT: *Negligence - Head-on collision between a motor-cycle and motor-car on a straight road at night - Motor-cycle was overtaking another car at the material time - Motor-cyclist liable for contributory negligence.*

DAMAGES: *Personal injuries - First plaintiff sustained fractures of two fingers - The second plaintiff had his foot amputated just above the ankle and sustained fractures of tibia, fibula, femur, dislocation of patella, residual scars and laceration - The second plaintiff underwent skin grafting.*

There was a head-on collision between a motor-cyclist (1st plaintiff) and a motorist (defendant) travelling from the opposite direction at night along a straight road. The motor-cyclist was overtaking another car at the material time. After the collision, there was glass fragments over the centre dividing line. The motor-cycle was found to be lying on its wrong side but very close to the centre line. The motor car was found to be stationary and close to and parallel to its own left edge of the road.

Held:

[1] The motor cyclist was negligent in overtaking a motor car in front of it in the face of an on-coming vehicle. The motor cyclist was ¾ to blame and the motorist was ¼ to blame.

[2] On the assumed basis of 100% liability against the 1st plaintiff, a sum of RM5,000 was awarded for fractures of two fingers with interest at 8% from date of service to date of satisfaction; loss of earnings in the sum of RM600 for two months with interest at 4% from date of accident to date of judgment.

[3] The 2nd plaintiff was awarded RM1,800 as agreed special damages; a sum of RM10,000 as agreed cost of future artificial limbs; a sum of RM35,000 for amputation of foot just above the ankle; a sum of RM18,000 for fractures of the tibia, fibula, femur, dislocation of *patella* skin grafting, residual scars and lacerations with interest of 8% on the said RM35,000 and the said RM18,000 from date of service to date of satisfaction; pretrial loss of earnings for 3 years at RM350 p.m.; partial loss of earnings at RM200 p.m. with interest at 4% from date of accident to date of judgment on all pre-trial loss of earnings, total or partial; and loss of future earnings as from date of judgment at RM200 p.m. on a purchase of 18 years. The 2nd plaintiff was about 26 years of age at the date of the trial.

Case referred to:

Dawrant v. Nutt [1960] 3 All ER 681

For the plaintiffs - R. K. Nathan; M/s. R. K. Nathan & Co.
For the defendant - Cyril O. Xavier and En. Azzat Kamaludin; M/s. Chua Brothers, Azzat & Xavier.

JUDGMENT

Peh Swee Chin J:

On 1 December 1983, I gave judgment against the defendant (motorist) in favour of 1st plaintiff (motorcyclist) and 2nd plaintiff (pillion rider) and from it, the motorist has now appealed.

According to the motor cyclist, on that day in question at about 9.30 p.m. he was riding his motor cycle with the pillion rider along Port Dickson/Seremban road from the direction of Port Dickson. On a straight stretch of the road, he was involved in a collision with the motor car driven by the motorist. He said he was in the course of overtaking another motor car, travelling ahead of him in the same direction and while he was in the course of so overtaking, and while about 2 feet from the centre dividing line but on his correct side of the road, his motor cycle collided with the on-coming car. He said further, and what he said further was crucial, that before the collision, he had seen an on-coming light which he thought had come from another motor cycle, and that the on-coming light was near to its own left edge of the road. That on-coming vehicle encroached onto his path and the collision took place. He denied having gone to his wrong side of the road.

The police investigation officer (IO), who took statements from all parties involved in this traffic accident and drew the sketch plan in question, by the date of the trial before me had unfortunately not only retired from the police force but was also terminally ill with cancer, so ill, that he could not attend the Court. However he was able to attend Court earlier while this case was partly heard by the previous Judicial Commissioner, who had since resigned also; and before his resignation, he had recorded the oral evidence of the investigation officer on 15 January 1982. When the trial commenced before me, the case was heard *de novo*, pursuant to an order made on an application therefor by learned Counsel for the motorist while it was strenuously opposed by the learned Counsel for the motor cyclist and pillion rider. In this connection, later, learned Counsel for the motor cyclist sought to have the type written notes of evidence recorded of the IO to be put in evidence. Learned Counsel for the motorist said he would not object to it subject to what was contained in the investigation dairy (D4) and statements recorded of all witnesses (D5) by the IO. I took this qualification of learned Counsel clearly to mean that the typewritten notes of evidence of the IO ought to be considered together with (D4) and (D5). It was then admitted in evidence as (P6). It would not be necessary to go into the grounds on which the learned Counsel for the motor cyclist relied in the first place for admitting such transcript (P6) in view of no objection thereto, offered by the learned Counsel for the motorist, albeit subject to that qualification mentioned above.

Now the relevant portion of (P6) reads as follows:

> ... The defendant told me his right front headlamp was not in working order prior to the collision.

He repeated this evidence when cross-examined by defence Counsel, one of the two learned Counsel for the motorist before me.

The pillion rider while giving similar evidence as that of the motor cyclist especially about having seen a light coming from the opposite direction just before the collision, had to admit that he did not see the on-coming car but he still maintained that he saw such a light.

The motorist said just before the collision, he saw a motor cycle encroaching onto his path. He also saw before that, lights of motor cycles, racing with each other from the opposite direction and there was a motor car facing him, parked on its left side of the road. He said

also that all his front headlights were in working condition or order before the accident. After the accident his headlamp was smashed and the small light was on. Looking at the photograph of the car taken after the accident, it would appear that the motorist was referring to the front offside headlamp that was smashed. In cross-examination, he denied having told the IO that offside headlamp had not been working before the accident, and said that it was a lie. The IO must have made a mistake. He said also that the four wheels of the stationary car (facing him), were on the side table. He then said that the motor cycle was overtaking a motor car in front of it. He disagreed, with glass fragments being found in the middle of the road.

DW2, wife of the motorist as well as the motorist's passenger, gave similar evidence about the accident except that she did not see any on-coming car. She maintained that the front offside headlamp in question was working prior to the collision.

PW2, a police inspector, who produced (D4), (D5) and (D6), gave evidence about the said IO being seriously ill in the district hospital at Pekan, and being unable to attend Court. When cross-examined, he said that the said IO had recommended that the motor cyclist be charged with an offence under s. 36(1) of the Road Traffic Ordinance, and such recommendation had been accepted by his OCPD.

DW3, the driver of the motor car that was being overtaken by the motor cyclist before the collision between the motor cycle and the motorist's motor car, gave evidence. I observed him and found him to be very evasive about the *piece de resistance* of the evidence in this case i.e. whether he saw, on that on-coming vehicle (the motorist's car), one headlight or two headlights instead. He said and maintained he did not know how many lights were on the motorist's car, but he got to know that it was a car after the impact. He said motor cycles were overtaking him at that time and one or two might not be able to avoid the on-coming vehicle. His evidence was thus so neutral, a situation, it is not unreasonable to say, which strove to bring about and succeeded, for reasons best known to himself.

The Court considered the sketch plan and all other exhibits produced in evidence especially the sketch plan and key (D6 and D4) which showed the glass fragments over the centre dividing line, the motor cycle involved to be lying on its wrong side but very close to the centre dividing line and the motor car involved to be found stationary close to, and parallel to its own left edge of the road.

I had no doubt at all, after considering the evidence, that the motor cyclist was negligent in overtaking a motor car in front of it in the face of an on-coming vehicle driven by the motorist. This was as much the admission of the motor cyclist as could be gleaned from the sketch plan and other evidence given in this case. The question that caused anxiety to the Court was whether the motorist was himself guilty of any contributory negligence. This problem, in the final analysis, turned on whether that the motorist had driven his car that night with its offside front headlight off, thus misleading the motor cyclist, so the motor cyclist alleged, into thinking, before the collision, that it was that of a motor cycle. The inference was obvious i.e. that blacked out right headlight caused him to take more risk which he would not otherwise have taken, i.e. in overtaking the car in front of it.

On this, there was a sharp conflict, with the motorist and his wife/passenger saying that all the headlights were on while the motor cyclist and the pillion rider deposed to the contrary. However the IO was positive about this. Yet, could he have made a mistake about it as alleged by the motorist? He was investigating into the accident and at the end of investigation, he had indeed recommended that the motor cyclist be charged. It was safe to assume that

while so engaged he was applying his mind to the various pieces of evidence to help him decide as to whether he should recommend any prosecution against any one and if so, as to whether it should be e.g. a charge of dangerous driving or the less serious charge of driving without due care and attention under the Road Traffic Ordinance. His investigation would namely thus involve a degree of alertness inconsistent with the mistake which learned Counsel suggested, could be attributed to him. However, while recording a statement (D5B) from the motorist, no question concerning this blacked out offside headlamp was addressed to the motorist who neither said anything about this. In his investigation diary (D4), the IO did not also mention this matter. Therefore could a mistake after all have occurred? There was no suggestion or evidence of bias on the part of the IO. The residuary effect after considering the IO's evidence on that point in my mind, was that such evidence, would not, standing be itself be ever sufficient, but it could certainly be considered together with other evidence.

On the evidence of the missing offside headlight, I found the evidence of the motor cyclist more probable than that of the motorist. The evidence of the motor cyclist, while susceptible to exaggeration for self-exculpative purposes, displayed a great deal of candour found totally lacking in the evidence of the motorist. The motor cyclist, e.g. deposed to his overtaking a motor car in front of him at the time of collision in the face of the on-coming vehicle. On the other hand, among other things, the motorist even disagreed with the position of the glass fragments found on the centre on both sides of the road by the IO. The road was a straight one and the motor cyclist could see on-coming traffic. On the balance of probabilities, I found that the motor cyclist thought he could overtake a car in front of him, without grave risk when he thought the oncoming vehicle was another motor cycle, all things considered including the IO's evidence.

I therefore found as a fact that the motorist had his offside headlamp off before the collision occurred. In *Dawrant v. Nutt* [1960] 3 All ER 681, driver of a motor cycle with a side-car combination had no light at all in front when he was involved in a collision with a car. The learned Judge there apportioned the blame equally between both drivers of the motor car and the motor cycle. Here the motor cyclist would, in my view have to accept a much higher degree of responsibility in view of all the circumstances, including the fact that the motorist still had one light on though the near-side one. I therefore found the motor cyclist (1st plaintiff) ¾ to blame and the motorist (defendant) ¼.

On the question of quantum, on the assumed basis of 100% liability against the 1st plaintiff, I gave judgment for RM5,000 for fractures of two fingers with interest at 8% from the date of service to date of satisfaction and loss of earnings limited to two months only as conceded by his learned Counsel, but in the sum of RM600 as assessed by the Court, i.e. at RM300 per month with interest at 4% from the date of accident to date of judgment.

For 2nd plaintiff, I gave judgment for RM1,800 as agreed special damages other than loss of earning and a sum of RM10,000 as agreed cost of future artificial limbs for which sum of RM10,000 judgment was also accordingly entered. I awarded a sum of RM35,000 for amputation of foot just above the ankle, and in addition thereto, taking into account of some overlapping effect, for the fractures of tibia, fibula, femur, dislocation of patella, skin grafting, residual scars and lacerations. I awarded another sum of RM18,000 with interest at 8% per annum on both these two sums from date of service to date of satisfaction.

Both plaintiffs who were doing similar works as carpenters were earning, according to their evidence, at least RM400 per month at RM16 per day before the collision. In May, 1983, when he gave evidence, 2nd plaintiff said he was earning then RM45 per day. I assessed their earnings at the time of accident at RM300 per month, taking account of their tendency

for exaggeration. I found however that there was a rising trend of wages of carpenters such as both the plaintiffs were. I therefore awarded for the 2nd plaintiff for pre-trial total loss of earnings for only 3 years but at RM350 per month to take account of the element of that rising trend of wages for carpenters. Carpenters work essentially with their hands, and they are skilled labourers. I found 2nd plaintiff quite nimble in his movements when appearing in Court, displaying only moderate exterior symptoms of his very serious injuries. After three years from the date of accident, I considered him to be capable of doing some gainful work as carpenter probably on a reduced scale and I assessed his partial loss of earnings at RM200 per month after the end of such three years, until judgment with the similar interest at 4% from date of accident to date of judgment.

Also found at [1984] 1 CLJ 313